

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 09 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH PAJARDO,

Defendant - Appellant.

No. 04-10230

D.C. No. CR-01-00160-4-SOM

MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, District Judge, Presiding

Argued and Submitted November 22, 2005
Honolulu, Hawaii

Before: BRIGHT**, McKEOWN, and CLIFTON, Circuit Judges.

Joseph Pajardo pleaded guilty to four drug-related offenses under 21 U.S.C. §§ 841, 843 and 846. Pajardo appeals his sentence on two grounds. First, he claims that his sentence violated United States v. Booker, 125 S. Ct. 738 (2005),

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

because the facts related to drug amounts and firearm possession were not admitted or proven beyond a reasonable doubt. Pajardo also claims that the district court erred in denying his motion for downward departure for coercion.

Pajardo pleaded guilty to three violations of 21 U.S.C. § 841(a) (defining drug offenses), involving “more than 50 grams” of methamphetamine, in violation of 21 U.S.C. § 841(b) (establishing broad penalty categories based upon drug quantities involved in the offense). In determining the Sentencing Guidelines range, the district court found that approximately 3000 grams were actually involved. Pajardo contends that his sentence should have been based only on the 150 gram drug quantity that he pleaded guilty to possessing, and not the 3000 grams.

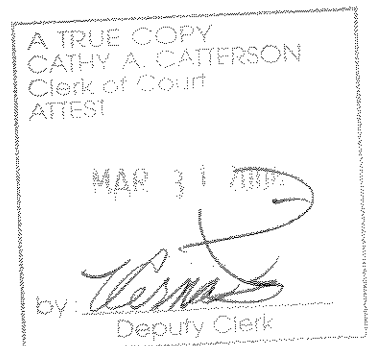
We decline Pajardo’s request that we vacate and remand his sentence, but agree, as the government concedes, that he is entitled to a limited remand under United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005). Even if the district court erred in calculating drug amount, the error did not increase the sentencing range beyond the statutorily authorized maximum based on Pajardo’s admission that the crimes involved more than 50 grams of methamphetamine. Nonetheless, the record in this case is insufficient to determine whether the sentence would have

been different had the judge known the Sentencing Guidelines were advisory. On plain error review, a limited remand is appropriate. Id. at 1084-85.

Pajardo also challenges the district court's enhancement of his sentence by two levels, pursuant to U.S.S.G. § 2D1.1(b)(1), for possession of a firearm. The district court erred in applying this enhancement in a mandatory Guidelines regime. The record is similarly insufficient to complete the appropriate prejudice analysis. On plain error review, a limited remand is appropriate. Id.

Lastly, Pajardo challenges the district court's decision not to grant him a downward departure for coercion under U.S.S.G. § 5K2.12. The district court recognized that it had the discretion to grant a downward departure for coercion but was not persuaded to do so. The district court's discretionary refusal to grant a downward departure is not reviewable and thus this portion of the appeal must be dismissed. United States v. Linn, 362 F.3d 1261, 1262 (9th Cir. 2004) (per curiam).

DISMISSED IN PART; REMANDED IN PART.



INTERNAL USE ONLY: Proceedings include all events.
04-10230 USA v. Pajardo

UNITED STATES OF AMERICA
Plaintiff - Appellee

Thomas C. Muehleck, AUSA
FAX 808/541-2958
808/541-2850
Suite 6-100
[COR LD NTC aus]
USH - OFFICE OF THE U.S.
ATTORNEY
PJKK Federal Building
300 Ala Moana Blvd.
P.O. Box 50183
Honolulu, HI 96850

v.

JOSEPH PAJARDO
Defendant - Appellant

Glenn D. Choy, Esq.
FAX 808/533-4007
808/533-7007
Suite 322
[COR LD NTC cja]
GLENN CHOY, ESQ.
735 Bishop Street
Honolulu, HI 96813